Boston stock exchange

STOCK BROKERS

AND THE

"WAGERING CONTRACTS ACT"

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THE following summary of decisions under the Statute known as the "Wagering Contracts Act," together with the present state of the Act, has been prepared by a well-known lawyer much interested in the matter and, although not prepared for the Boston Stock Exchange, it is now, by reason of its importance, and with the author's consent, published by the Governing Committee for the information of its members.

GEORGE A. RICH,
Secretary.

STOCKBROKERS
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An act has been lately passed by the Massachusetts Legislature intended to mitigate some of the hardhips that have been imposed on stockbrokers by means of the statute known as the "Wagering Contracts Act," which is contained in the Revised Laws, c. 99, ss. 4-7. The new act, which is c. 247 of the acts of the present year and goes into effect on September 18, 1919, amends the two principal sections of the present act by adding the provisions set out below in brackets, so that the sections read as follows:

> *Section* 4. Whoever upon credit or upon margin contracts to buy or sell, or employs another to buy or sell for his account, any securities or commodities, intending at the time that there shall be no actual purchase or sale, may sue for and recover in an action of contract from the other party to the contract, or from the person so employed, any payment made, or the value of anything delivered, on account thereof, if such other party to the contract or person so employed had reasonable cause to believe that said intention existed; *but* no person shall have a right of action under the provisions of this section if, for his account, such other party to the contract or the person so employed makes, in accordance with the terms of the contract or employment, personally or by agent, an actual purchase or sale of said securities or commodities, *or a valid contract therefor.* [If a purchase or sale of the securities or commodities ordered to be bought or sold is made by the person so employed on a stock exchange or board of trade, and other purchases or sales of such securities or commodities are made on the same day on such exchange or board by such person for others in due course of business, and the balance of such purchases or sales of securities or commodities is received or delivered by such person by direction of the clearing house of such exchange or board on the day when such purchase or sale

or contract therefor is made, or on the regular clearing day of such exchange or board next thereafter, which clearing day shall in no event be more than four days after such purchase or sale, or contract therefor, is made, such purchases and sales shall be deemed actual purchases and sales within the meaning of this section.]

Section 6. In a proceeding under the provisions of the two preceding sections, [if the person so employed does not make an actual transaction relieving him from liability under the provisions of section four,] the fact that the seller or the person employing another to sell for his account did not own the securities or commoditites at the time of the contract of sale or at the time of the giving of the order to sell, and the fact that settlements were made without the completion of the purchase or sale of the securities and commodities bought or sold or ordered to be bought or sold, shall each be prima facie evidence that within the meaning of section four there was an intention that there should be no actual purchase or sale, and that there was reasonable cause to believe that said intention existed; and the parties liable to an action under the provisions of said section shall be jointly and severally liable.

Origin of the Statute

It is important that is should be understood how the law on this subject reached its present state in Massachusetts and how it has been brought to bear so oppressively upon stockbrokers. The statute originated in an act of 1890, c. 437, "relative to wagering contracts in securities and commodities," which was promoted by the stockbrokers themselves for the purpose of suppressing "bucket shops." A petition in support of the legislation was signed by M. R. Ballou, who was then chairman of the Boston Stock Exchange, Lyman B. Greenleaf, Francis A. Davis, and fifty-four other bankers and brokers (House Journal, p. 399). The bill (House No. 528) was passed as is was reported by the Judiciary Committee without any substantial change.

The act differed from the present statute, in the sections corresponding to those above set out, in providing that a person contracting to buy or sell, or employing another to buy or sell.

might sue and recover any payment or the value of anything delivered, if he had at the time "*no intention* to perform the same by the actual receipt and delivery of the securities or commodities," and there was no provision that he should not have a right of action if the other party or the person employed made an actual purchase or sale or a valid contract therefor. There was also a provision that the fact that the seller, or the person employing another to sell, did not own the securities or commodities at the time, and the fact that settlements had been made without actual delivery and receipt of them, should each be prima facie evidence that no such intention existed.

This act had little effect in the way of suppressing bucket shops, but it was turned with great success against the brokers themselves. An attempt was even made in *Rice* v *Winslow*, 180 Mass. 500, to hold a broker liable to a customer, who had employed him to buy securities, intending that he should do so and carry them for him with a margin of security against loss, and that they should afterwards be sold in pursuance of the customer's orders. It was contended that the contract between them was one of sale, by which the broker agreed to buy the shares and ultimately to sell them to the customer, and, as the customer did not intend to receive the securities from the broker and pay for them, the transaction was within the act. But this contention entirely failed, and it was held that the customer did not contract to buy from the broker at all, but only employed him as an agent to buy for him, and, if he intended that the broker should do so, the transaction was not a wagering contract and was not within either clause of the statute.

AMENDMENTS OF 1901

It had become evident however that the act invited fraudulent claims by dishonest customers, who would pretend, if their speculations were unsuccessful, that they had no intention that the broker should buy or sell in accordance with the orders that they had given. They would affect an ignorance of the meaning of their orders or what the course of business was, and would say that they only intended to speculate and had *no intention* at all as to the manner of doing it. Such frauds were facilitated by the artificial evidence provided by the statute in cases of "short sales," where the fact that the customer did not own the

securities when he gave the order to sell them was made prima facie evidence that he had no intention actually to deliver them and that the broker had reason to believe that no such intention existed. This fact was not really any ground for imagining the absence of such intention, independently of the effect arbitrarily given to it by the statute, for an order to sell when the customer "sells short," is ordinarily executed in the same manner as any other order to sell, and, if the customer does not provide the securities to be delivered, the broker provides them in the way explained by the court in *Chandler* v *Prince*, 221 Mass. 495, 502. The court itself in *Parkhurst* v *Almy*, 222 Mass. 27, 31-32, directed a similar transaction for the purpose of enforcing a judgment, by "selling short" shares belonging to the judgment debtor which were not in its possession or control, and borrowing other like shares to be hypothecated for the protection of the corporation against liability for issuing new certificates. But the statute nevertheless says that ordering a "short sale" shall be prima facie evidence that the person giving the order does not intend to sell, although this is contrary to the fact unless there is also an understanding to that effect between the parties.

For the purpose of relieving stockbrokers from some of these oppressive provisions of the statute, it was amended by the act of 1901, c. 459, which changed the two sections into their present form, without the additions made in the present year as already mentioned. The amendment was made upon the petition of Kidder, Peabody & Co. and others with a bill accompanying their petition (House No. 736). The bill proposed to change the provision that a person contracting to buy or sell, or employing another to do so, might recover if he had *no intention* to perform the contract, by substituting for it a provision that a person so contracting, or employing another "having at the time *the intention* that the contract *is not* to be performed," by the receipt or delivery, etc., might recover if the other party, or the person employed, had reason to believe that such intention existed. It also provided that there should be no right to recover if the person so employed had "*performed* the contract of purchase or sale by the receipt or delivery of the securities or commodities." This last provision was a recognition of the fact that the customer's *intention* that the contract

should not be performed, and the *reason to believe* that such intention existed, although established by legal evidence, might really have no existence in fact, for otherwise it can hardly be imagined that the legislature would provide that an agent might exonerate himself from liability by doing what he had reason to believe that his employer intended that he should not do. The bill however retained the provision for the fictitious evidence, that an order for a sale by a person not owning the securities or commodities at the time should be prima facie evidence of his intention that the contract should not be performed and of the other party's reason to believe that it existed, the language being changed only to correspond with the change in the previous section.

While this bill was under consideration by the judiciary committee, it was suggested by the counsel for certain brokers that the provision above mentioned, regarding performance by receipt or delivery of the securities, would not give the intended protection to brokers who bought and sold securities upon the stock exchange, because their purchases and sales of each kind of securities during the day were by the rules of the stock exchange set off against one another and only the balance, if there was any, was received or delivered. It was obvious that a contract of purchase or sale was never performed by a receipt or delivery of the securities, where the contract was set off against another contract, and nothing, or only a part of the subject of the contract, was received or delivered. Therefore it was suggested that, as the object of the statute was only to prevent "wagering contracts" and to ensure actual transactions, a valid contract for a purchase or sale ought to protect a broker against an action as effectually as a purchase or sale completed by receipt or delivery of the securities, and that a provision to that effect should be included in the bill. This suggestion was adopted by the committee, and the bill was redrawn with a provision, in the terms of the present statute, that there should be no right of action if the other party to the contract, or the person employed to buy or sell, "makes in accordance with the terms of the contract or employment, personally or by agent, an actual purchase or sale of said securities or commodities, *or a valid contract therefor.*" The bill as so drawn was reported to the House

of Representatives (House No. 1212) and was afterwards passed (1901, c. 459; Rev. Laws, c. 99, ss. 4, 6). The amendment of the act so as to improve the position of the brokers was opposed by the representatives of the "bucket shops," for they would derive no benefit from the amendments and they wished the act to operate with as much severity as possible against their enemies, the brokers.

The Customer's Intention

After the passage of this amending act it was held in 1904 in *Wilson* v *Head*, 184 Mass. 515, 517, that a recovery could be had against a broker, only when the customer had an affirmative intention "that there shall be no actual purchase or sale," while the former statute allowed such a recovery, not only when there was such an affirmative intention, but also when there was a mere negative state of mind in regard to the subject.

Contracts for Purchase or Sale

Subsequently the question arose in *Fiske* v *Doucette*, 206 Mass. 275, whether a broker made out a defence by showing purchases and sales made upon the New York and Boston stock exchanges. The purchases and sales appear to have been made in the usual way and cleared according to the ordinary practice by setting them off against other purchases and sales of the same broker and delivering or receiving the balance. It was held that this was insufficient to establish a defence. It is said in the opinion of the court (p. 280).

> "Whether *valid contracts* for such securities were made is not raised by the defendant's exception. The defence was not and could not well have been based upon this ground, the claim being that according to the practice of the stock exchanges *actual sales and purchases* were shown. There was nothing in the case to indicate contracts for *future deliveries*. The dealings were all on the footing of *present deliveries*."

As the question whether *valid contracts* were made was not raised, it is probable that less attention was given to the question than otherwise would have been the case, and it was not observed that the statute says nothing about future deliveries and speaks only of "an actual purchase or sale of said securities

or commodities, or a valid contract therefor." The remarks were only obiter dicta and had no effect in the decision of the case against the defendant.

But afterwards in the case of *Adams* v *Dick*, 226 Mass. 46, the point was directly raised. The purchases and sales were made upon the New York stock exchange and the terms were entered on tickets signed by the brokers and showing the delivery date, which was always the day following, or the following Monday when the transaction was on a Friday or Saturday (p. 54). But it was decided that the brokers could not maintain a defence on the ground that they had made valid contracts for the purchase and sale of the securities, and the views expressed in the dicta in the previous case were again asserted and amplified as follows: (pp. 55-56).

> "The course of business of the stock exchange shown in this case is in every essential *a present sale* of stocks and not a contract *for a future delivery* within the meaning of the statute. The delay in the physical transfer of the possession for a day is for *mutual accommodation* growing out of the nature of the property to be delivered and the possible necessity for the issuance of new certificates in order to complete the sale. But it is none the less a present sale because of this delay in the delivery. The dealings were all on the *footing of present deliveries* . . . . The words 'a valid contract therefor' in the clause of R. L. c. 99 s. 4, which provides that there shall be no recovery where the broker or other party makes 'an actual purchase or sale of said securities or commodities, or a valid contract therefor' *refer to contracts for future deliveries* and not for present sales such as were conducted on the stock exchange in the case at bar. The statute applies, also, to commodities, which includes provisions and grain, which are dealt in by contracts for future delivery, and which afford *ample scope* for the operation of the statute on contracts for future deliveries."

Although it is asserted that the words "a valid contract therefor" refer to contracts for future deliveries, no attempt is made to justify this restriction of the language by anything contained in the statute. The natural meaning of the words is not restrained by anything in this or any other part of the statute. The clause immediately preceding is "an actual purchase or sale of said securities or commodities," and "a valid contract therefor"

plainly means a valid contract for the purchase or sale of the securities or commodities. There is no qualification except that the contract must be made in accordance with the terms of the employment of the person employed to buy or sell, and this qualification applies equally to "an actual purchase or sale." There is no rule of law that authorizes the court to limit the plain meaning of the statute by construction, so that it shall only have the effect that it would have had if the words had been "or a valid contract therefor *for future delivery*."

As regards the statement that the statute applies also to commodities, including provisions and grain, "which are dealt in by contracts for future delivery, and which afford ample scope for the operation of the statute on contracts for future deliveries," it should be observed that the statute applies also to *securities*, which are defined by s.7 as including shares, bonds, coupons, and other evidences of debt, and scope is not afforded for the operation of the statute if such contracts as are usually made for their purchase or sale are excluded from its operation. It seems to have been thought that the provision had sufficient scope if something could be found to which it might apply without including stockbrokers in its protection. No reason is suggested for putting such a strain on the language of the statute.

It is also difficult to follow the reasoning by which the conclusion is reached that the purchases and sales made by the defendants upon the stock exchange were not contracts for future deliveries. These purchases and sales, like other stock exchange contracts, were expressly made for delivery on the following, or a subsequent day, as above mentioned. In the ordinary use of language, the following day is considered as future, but it is said in the opinion of the court that the contracts were not for "a future delivery *within the meaning of the statute*," because the dealings were "on the footing of present deliveries," and the delay in the physical transfer was for mutual accommodation and the possible necessity for the issue of new certificates. It is hard to determine "the meaning of the statute" as to a future delivery, when the statute does not mention future delivery at all. But it is certainly a mistake to say that the contracts were made on the footing of present deliveries, for it is expressed in them that the deliveries were to be made on the following day,

and a present delivery could not have been required nor a present payment called for. It is also a novelty to hear it said that to-morrow is not future, when it is agreed upon for the mutual convenience of the parties or for any other reason. In suggesting that the reason may have been the possible necessity for a new certificate to complete the sale, it must have been supposed that the selling broker was bound in the interval to get a new certificate, before he knew who the broker was to whom the delivery was to be made, or into what name the transfer was to be made, or whether he himself was to make any delivery at all or was on the contrary to receive a transfer of shares from some other broker. It is evident however that this suggestion was not applicable to bonds or securities payable to bearer, which pass by delivery.

On the grounds above stated stockbrokers have been excluded from the benefit of this provision, which was put into the statute especially for their protection in executing the orders of their customers upon the stock exchange, and, as far as they are concerned, the provision is eliminated from the statute as effectually as if it had been provided that is should not apply to the transactions of stockbrokers.

Taint of One Transaction

Another point was involved in *Fiske* v *Doucette*, 206 Mass. 275, 285. It appeared that in a number of instances the purchases made by the broker were actually completed and he had in his control certificates for the shares purchased. But the court held that the broker was liable for the whole amount claimed as if all the transactions had been contrary to the statute, and gives the following reasons (p. 285),

> "Although there was evidence that in a number of transactions the defendant did have in his control certificates for the stock purchased for the plaintiff's account, yet as to many there either was no such evidence or there was definite evidence that he did not have them. The *whole series of dealings* based upon the bonds deposited with the defendant was thus *tainted* with illegality and the plaintiff is entitled to recover. *Way* v. *Greer*, 196 Mass. 237, 245. *Kennedy* v. *Welch*, 196 Mass. 592, 595. *Embrey* v. *Jemison*, 131 U. S. 336."

The proposition that a series of dealings is tainted with an illegality in one or a part of them is not supported by anything in the cases cited. They only go to the point that a contract is void if the consideration for that particular transaction is illegal in whole or in part. There seems to have been no previous authority for the proposition that the illegality of one transaction taints any other dealings between the parties. On the contrary the law seems to have been clearly the other way. If a grocer's account contains charges for intoxicating liquors sold in violation of law, the illegality does not taint the other dealings included in the same account. This is shown by the decision in *Warren* v. *Chapman*, 105 Mass. 87, 89, where a promissory note for $500 was given to be applied to the maker's account with the plaintiff's firm. The account contained items for intoxicating liquor illegally sold, but the charges for goods lawfully sold exceeded $500. The court held the note to be perfectly good, saying, "When the note was given, the law applied it to the items of the account lawfully sold." The same principle was applied in *Bondy* v. *Hardina*, 216 Mass. 44, 48, where there was a series of dealings in intoxicating liquors, one of which was illegal and the others were not. According to what is laid down in *Fiske* v. *Doucette*, a stockbroker does not stand in as good a position before the law as a grocer who makes illegal sales of intoxicating liquor, and an illegality in one of his transactions taints all his other dealings with the same person. The only limit to the taint that has yet been established is that it does not extend to transactions included in an account that was balanced or "squared up" more than six years before the action (*Houghton* v. *Keveney*, 230 Mass. 49, 53).

The Customer's Intention Again

It also seems as if the statutory requirement that a customer, in order to sustain an action, must have an intention that there shall be no actual purchase or sale, had almost faded into a shadow. An order to sell given by a person who does not own the securities is made by the statute prima facie evidence that he intends that the sale shall not be made. This however is only evidence and does not establish the fact, if there is any other evidence of his intention. If the customer himself is a

witness and admits that he did not have any intention at all, no reasonable person would believe, by reason of the prima facie evidence, that he did have an intention that there should be no sale. This is not a question of law, but of common sense, and the judge or jury that determine the facts must decide between the prima facie evidence created by the statute and the actual admission of the person himself. If they find the fact to be that he did not have any intention, that is the end of the prima facie evidence. It cannot properly be used to impose on him an intention that he did not have. Yet that is very nearly what was done in *Adams* v. *Dick*, 226 Mass. 46, 52. The auditor, upon whose findings of fact the case was heard, found as to the plaintiff's intention as follows (record. pp. 17-18),

> "He had no intention as to whether or not defendants in carrying out his orders to buy or sell should actually receive or deliver from or to anyone else certificates of stocks ordered by him to be bought or sold, and defendants did not believe and had no reason or ground to believe that any such intention existed."

Notwithstanding this special finding of fact, he found generally in conclusion (p. 20), among other things, that the "plaintiff intended that there should be no actual purchase or sale, and defendants knew and believed that said intention existed," and the court held that this general conclusion was not inconsistent with the special finding. This is explained in the opinion of the Court as follows (p. 52),

> "This is not inconsistent with the express finding that the plaintiff had no intention as to the point whether the defendants, in carrying out his orders to buy or sell, should actually receive from or deliver to any one else certificates of stock ordered by him to be bought or sold. This is not a finding that there was a negative lack of intention by the plaintiff upon the vital point that there should be '*no actual purchase or sale*' on his orders. It relates to the different subject of *delivery and receipt of certificates.* His mind might be a blank upon that matter and still the positive intention that there should be no actual purchases or sales on his orders arise from the prima facie case to that effect made out by the *short sales* and from all the other circumstances in the case tending to that conclusion."

As shares are usually transferred by delivery of the certificates with the proper assignment and cannot be effectually transferred without delivery of the certificates (as shown in *Parkhurst* v. *Almy*, 222 Mass. 27, 29,) it might reasonably have been understood that the receipt or delivery of the certificates was referred to as meaning the same thing as an actual purchase or sale of the shares. Similar expressions were used with that meaning by the same judge in *Fiske* v. *Doucette*, 206 Mass. at pp. 280, 281, 282, 283, 284, in determining whether there had been actual purchases or not, and it is strange if the meaning was not the same in *Adams* v. *Dick*. But the prima facie evidence created by the statute out of the "short sales" was sufficient to overcome the effect of the finding and to force upon the plaintiff a positive intention which he could not be induced to say himself that he had. There is also in the opinion a reference to "all the other circumstances in the case tending to that conclusion," but no such circumstances are mentioned and an examination of the record upon which the case was heard does not disclose any.

This is added however (p. 52),

> "It was expressly found that the plaintiff 'intended not to receive nor to deliver *himself* any of the stocks ordered by him to be bought or sold by the defendants, and the defendants, knew he so intended," although this is not conclusive."

This sounds like an echo of the contention that was made by the plaintiff in *Rice* v. *Winslow*, 180 Mass. 500, 502, and rejected by the court. The court there held that it was "entirely immaterial" whether the customer intended to have the broker hold the securities for him until they should be sold in pursuance of his orders and then to receive the balance or pay the loss, or whether he intended ultimately to pay the balance of the purchase money and receive the securities from the broker, and that the arrangement did not make the transaction a wagering transaction. It does not seem sufficient to say in *Adams* v. *Dick* that the finding "is not conclusive," but is should have been said, in accordance with *Rice* v. *Winslow*, that it was "entirely immaterial" and was not entitled to any consideration.

Repayments to the Customer

There was also another question in *Adams* v. *Dick*, and it is not easy to understand the manner in which it was disposed of. The case came before the court upon a report of the judge, which was accompanied by the auditor's report and set out the questions reserved for the court and the manner in which the case was to be dealt with according to the decision of the question. A copy of the plaintiff's account with the defendants, taken from their books, was annexed to the report (record, p. 11, B), which stated that there was no dispute as to the items (p. 4), and the auditor (p. 18), as well as the judge (p. 20), had found the account to be a true record of all the transactions. The judge reserved in his report (p. 8) the following question, among others, for the court, viz.

> "If I ruled correctly in all other respects, but if the defendants are entitled to have the amount which is recoverable by the plaintiff reduced to any extent on account of payments made by them to him from time to time, as found by the auditor, and as appears from the statement of the account above referred to, such order is to be made, either for a new trial or for judgment in a stated amount, as may seem proper to the court."

These matters and the question reserved upon them are not mentioned in the report of the case in 226 Mass. 46, or alluded to in the opinion of the court, but they appear in the printed record of the case, which is bound up with the briefs in the collection in the Law Library at Boston, and any one can see them there. At the trial the judge had been requested by the defendant to make certain rulings and findings (226 Mass. 48-49), which he refused. One of them, numbered 11, was, that the plaintiff had paid the defendants from time to time on account of the tranasctions sums amounting in the aggregate to $23,031.50 and that the defendants had repaid to him from time to time on that account sums aggregating $17,486.38, and that the action could be maintained only for the balance $5,545.12, with proper interest. This request seems not to have been urged in the Supreme Court and no reference to it is made in the defendant's brief (p. 19), by which the defendant's case appears to have been rested entirely upon the provision of the judge's report above

mentioned. But the court, not regarding that provision or the account or the argument upon them disposed of the matter as follows (226 Mass. p. 57),

> "The eleventh request was denied. The request involved a finding of fact as well as a ruling of law. The finding of fact was not made. This cannot be said to have been erroneous in law. If the repayments were not in fact on account of the principal sums paid in, but on account of the unlawful transactions, then the defendants were not entitled under the statute to be credited with them. Sufficient facts were not found which required the ruling as matter of law that the payments made should be credited to the defendants. This aspect of the case is covered by *Lyons* v. *Coe*, 177 Mass. 382, 384; *Anderson* v. *Metropolitan Stock Exchange*, 191 Mass. 117, 122, 123; *Picard* v. *Beers*, 195 Mass. 419, 429; *Beers* v. *Wardwell*, 198 Mass. 236."

It was then said that, there being no error in the rulings made or those denied, judgment should be entered for the plaintiff "in accordance with the terms of the report" for $23,031.50 with interest from the commencement of the action. But the terms of the report did not authorize such a judgment without disposing of the question whether the amount was reducible to any extent on account of the payments made to the plaintiff. That question is not alluded to by the court and the remarks above quoted are inapplicable to it. The 11th request, which alone was dealt with, was in fact rendered entirely immaterial by the provision regarding the question reserved, which required that, if the amount was reducible to any extent on account of the repayments as appeared by the account, although not to the whole extent of $17,486.38 as claimed, an order should be made either for a new trial or for judgment for the proper amount. It could not be said that sufficient facts were not found to establish that repayments were in fact made on account of the principal sums paid in and not on account of the "unlawful transactions." Those facts appear in the account, which was found to be correct, both by the auditor (record, p. 18) and the judge (p. 20) and the agreement of the parties (p. 4).

In the account (p. 11) the first repayment was on Sept. 24, $3500. At that time the only moneys standing to the plaintiff's

credit were moneys that had been paid in by him as follows, Aug, 3, $2500, Aug. 19, $800, Sept. 23, $4831.50 (part of $34,831.50 proceeds of sale of shares, upon which $30,000 had been advanced to pay the State Street Trust Co. on the plaintiff's account, as explained and found by the auditor, p. 15, and in accordance with the plaintiff's claim, p. 13). There were no other moneys and no other transactions on account of which that sum of $3500 could have been paid to the plaintiff. The defendants were accordingly entitled to have the amount recoverable reduced by $3500, even if there were no other payments that ought also to be deducted. According to the terms of the report, the court was not at liberty in these circumstances to enter judgment for the whole amount without any reduction, but was bound either to order a new trial or to ascertain the proper amount and enter judgment for the amount ascertained.

The court might well have hesitated to go into all the particulars of the account in order to ascertain whether each transaction resulted in a profit or a loss and out of what moneys each payment to the plaintiff was made. But the terms of the report did not authorize the court to give judgment for the whole amount without going into the account far enough to determine whether the plaintiff was entitled to have the amount reduced to any extent or not. When that fact was ascertained the case might have been remitted to the court below to ascertain the exact amount of all the proper reductions. The account distinctly shows that the first repayment of $3500 was made out of moneys paid in by the plaintiff. It also shows that the subsequent repayments could not have been made without resorting to the moneys from time to time paid in by the plaintiff. It also shows that all his profits from such of the transactions as resulted in any profit amounted to only $3,055.25, and, if these had been paid to him at the time without regard to his previous losses, which far exceeded them, he still would have received $14,431.13, which could not have been paid on account of anything except the money that he had paid in.

But besides this, the fact was found that none of the repayments were made "on account of the unlawful transactions," the possibility of which is suggested by the court in disposing of the 11th ruling requested in the court below (226 Mass. p. 57). The auditor found that "During the period . . . . .defendants

paid to plaintiff in various amounts *not related to particular transactions* the total sum of $17,486.38" (record, p. 18), and this finding was confirmed by the judge (p. 20). As the payments did not relate to particular transactions, they were not made on account of the unlawful transactions, and the rules of law required the application of the repayments to the lawful demands. This is shown by *Bondy* v. *Hardina*, 216 Mass. 44, 48, where one of the items in an account was an illegal sale of intoxicating liquor, and the court held that the creditor receiving money paid towards the account generally without any specific appropriation could not apply it to the illegal item and sue for the others, but "the law will apply these payments to the lawful demands." The circumstances were the same in this case. The only demands that the plaintiff had against the defendants, other than those held to be unlawful, were on account of the principal sums paid in, and by law the repayments were applicable only to those demands. The case of *Lyons* v. *Coe*, 177 Mass. 382, and other cases of its class, where the payments were made and received as the sums due upon closing illegal contracts, are irrelevant to the matter. Accordingly the fact was found that repayments to the amount specified were made in a manner that required their application to the principal sums paid in. This is the only fact involved in the 11th request, and the ruling of law necessarily followed, that the action could be maintained only for the balance, $5,545.12. It would seem therefore that the court ought to have decided that this particular ruling should have been made, and that judgment should be entered for that sum in accordance with the terms of the report, which provided that judgment should be entered for $5,545.12, if the ruling ought to have been made (record, p. 8).

The result of the whole matter is that the defendants were obliged, not only to reimburse the plaintiff the amount of his losses, $5,545.12, but also to pay him a second time $17,486.38 with interest for over six years. This profit to the plaintiff from the enterprise was certainly much more than he could have expected if his speculations had been successful.

How the court came to dispose of the case so summarily and give judgment against the defendants for the whole amount,

without any reference to the account, or to the provision in the report for reducing the amount, and without any regard to the fact that the repayments had been made in a manner that did not permit the application of any part of them to unlawful transactions, is incomprehensible. But it is plain on the face of the record that a great wrong was done to the defendants.

The Present Situation

The statute of 1919, c. 247, in the amendments above set out, provides that if a broker receives or delivers the balance of his purchases or sales on the stock exchange by the direction of the clearing house as mentioned, the purchases and sales shall be deemed actual purchases and sales within the meaning of s. 4 of the amended act. This gives him a new defence, which does not seem capable of being nullified by the method applied to the provision that there shall be no right of action against him where he has made a valid contract for the purchase or sale of the securities. The fictitious evidence provided by the statute in favor of the customer in cases of "short sales" is also limited to cases where the broker does not make an actual transaction under the provisions of s. 4. This seems to make such evidence unavailable to establish the intention on the part of the customer, until it has been first established that the broker did not make an actual purchase or sale, either by receipt or delivery of the balance directed by the clearing house or otherwise, or by a valid contract therefor. But, if in a single instance of a "short sale" the broker fails to receive or deliver the clearing house balance, or otherwise to show an actual transaction, that lets in the fictitious evidence of intention. The difficulty of overcoming that evidence, even by the admission of the customer himself that he had no such intention, has already been shown. If this prima facie evidence is not overcome, the transaction will be considered illegal, and, that being illegal, all the other transactions with the same customer will go down like a row of bricks. The "taint" of one illegal transaction, which in the case of an illegal seller of intoxicating liquor does not affect his other transactions, prevents a stockbroker from afterwards making any valid purchases or sales for the same customer and spoils all those previously made, although they were originally not open to any question. If he makes any payments to the

customer without directions as to the manner in which they are to be applied, it will be assumed that they may have been made on account of the illegal transactions, unless the contrary is affirmatively proved, and they will be disregarded in computing the amount that the customer is entitled to recover.

There is no justice or morality in a statute that provides for or permits such things, and there is no reason why it should be allowed to continue in force. The evil aimed at by the statute was the making of "wagering contracts," as expressed in its original title and explained in *Rice* v. *Winslow*, 180 Mass. at p. 501. It was intended by this means to suppress "bucket shops," which were places where a business of betting on the rise and fall of the values of securities was carried on in the form of orders or contracts to buy or sell with the understanding of both parties that there was to be no purchase or sale at all and that the loss or gain should depend on the market values. It was popularly called the "bucket shop act," but was a failure as far as the suppression of those establishments was concerned, and it was found necessary to make entirely different provisions for that purpose by the act of 1907, c. 414, by which the species of contract aimed at was defined and made criminal offence. But the Wagering Contract Act (1890, c. 437; R. L. c. 99, ss. 4-7) does not mention wagering except in the title, and goes entirely outside of wagering contracts in its provisions, which would not touch stockbrokers engaged in regular transactions unless it did so. The provision, that whoever employs another (e.g. a broker) to buy or sell on his account, intending at the time that there shall be no actual purchase or sale, may recover from him any payment made on account thereof, if he had reasonable cause to believe that the intention existed, is not limited to wagering contracts by its language and has not been so limited by construction. The authors of the act evidently had wagering contracts in mind, but they must have had a very indefinite idea how the wagering entered into this provision. A broker, receiving an order to buy for a customer with knowledge that the customer intended that there be no purchase, would not be justified in buying for him, and if he did, he would not be able to make the customer responsible for the price, but there would certainly not be any wagering contract, unless there was also

an agreement or an understanding between them that the transaction should be settled according to the rise or fall in the market prices, or in some similar way, the broker losing in one case and the customer in the other. If the act had been limited to wagering contracts, there would have been no more color for its application to such cases as *Fiske* v. *Doucette*, 206 Mass. 275, *Adams* v. *Dick*, 226 Mass. 46, and *Houghton* v. *Keveney*, 230 Mass. 49, which are mentioned above, than there was for its application to *Rice* v. *Winslow*, 180 Mass. 500.

The idea of the wagering contract has thus disappeared from the provisions of the act. But the act also facilitates the proof of the case of the customer by the provision that an order to sell shall be prima facie evidence of an intention that there shall be no sale and of the reason to believe in the existence of the intention, if the customer does not own the securities at the time. This is purely fictitious evidence and is contrary to the natural inference, which is that the customer intends that the broker shall sell and obtain the securities for delivery in the usual way, as explained by the court in *Chandler* v. *Prince*, 221 Mass. at p. 502. There is no doubt that this is what the customer intends, and the opposite intention is imputed to him by the statute contrary to the truth. It is as unreasonable to do this as it would be to provide that an order to buy, when the customer does not furnish the money, shall be evidence that he has an intention that there shall be no purchase.

There is no reason why persons should be encouraged to engage in stock speculation by provisions of law that enable them to throw their losses on the brokers employed by them, when the speculations are unsuccessful, while they are allowed to keep all their gains themselves. It is wrong to provide them with evidence to assist them in establishing a case that is contrary to the truth, and with inducements to speculate by means of "short sales," which will furnish evidence of a "taint" that will extend to other transactions. There is no such legislation in New York or England, where the number of transactions is infinitely larger, and there is no occasion for it here.